

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA )  
)  
)  
vs. )  
) No. 1:16-cr-10134-DPW  
)  
DAVID TKHILAISHVILI AND )  
JAMBULAT TKHILAISHVILI, )  
)  
Defendants.

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK

SENTENCING HEARING

John Joseph Moakley United States Courthouse  
Courtroom No. 1  
One Courthouse Way  
Boston, MA 02210  
Thursday, September 14, 2017  
2:35 p.m.

Brenda K. Hancock, RMR, CRR  
Official Court Reporter  
John Joseph Moakley United States Courthouse  
One Courthouse Way  
Boston, MA 02210  
(617)439-3214

1 APPEARANCES:

2 UNITED STATES ATTORNEY'S OFFICE  
3 By: AUSA Laura Kaplan  
4 John Joseph Moakley Federal Courthouse  
5 1 Courthouse Way  
6 Suite 9200  
7 Boston, MA 02210  
8 On behalf of The United State of America.

6 FEDERAL PUBLIC DEFENDER OFFICE  
7 By: Oscar Cruz, Jr., Esq.  
8 District of Massachusetts  
9 51 Sleeper Street  
10 5th Floor  
11 Boston, MA 02210  
12 On behalf of the Defendant.

11 HEDGES & TUMPOSKY, LLP  
12 By: Michael L. Tumposky, Esq.  
13 Suite 600  
14 50 Congress Street  
15 Boston, MA 02109  
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1           (The following proceedings were held in open court  
2 before the Honorable Douglas P. Woodlock, United States  
3 District Judge, United States District Court, District of  
4 Massachusetts, at the John J. Moakley United States Courthouse,  
5 One Courthouse Way, Courtroom 1, Boston, Massachusetts, on  
6 Thursday, September 14, 2017):

7           THE CLERK: All rise.

8           (The Honorable Court entered the courtroom at 2:35 p.m.)

9           THE CLERK: This Honorable Court is now in session.  
10 Please be seated. Criminal Action Number 16-10134, United  
11 States v. Tkhilaishvili.

12           Alex, please raise your right hand.

13           (Interpreter duly sworn by the Clerk)

14           THE CLERK: Please be seated.

15           THE COURT: Well, I have received a series of  
16 materials recently, and so I want to be sure that I have  
17 identified what is outstanding here. I have received a  
18 supplement to Jambulat Tkhilaishvili's Motion for Judgment of  
19 Acquittal. There has not been a response by the Government to  
20 the original motion and nor, obviously, much time for the  
21 second one.

22           MS. KAPLAN: No. It was served yesterday, your Honor,  
23 but I can certainly orally argue it. I think it is completely  
24 distinguishable.

25           THE COURT: Well, maybe we will hear oral argument.

1 But on the earlier Motions for Judgment of Acquittal there was  
2 no opposition filed; not that it is an opposition, but no  
3 explanation.

4 MS. KAPLAN: Oh, I see. I don't even remember that  
5 they filed a written --

6 THE COURT: May 4th and May 5th.

7 MS. KAPLAN: Well, I will certainly file something in  
8 short order.

9 THE COURT: Well, we will talk about it, I think, but  
10 I want to be sure that I have got all the papers, and it may be  
11 that it is necessary to talk about it before reaching a final  
12 conclusion here. Jambulat Tkhilaishvili has also asked for a  
13 Motion to Supplement, and obviously I am going to allow that on  
14 the Motion for Judgment of Acquittal. Jambulat has filed a  
15 Sentencing Memorandum, and I believe that is all for Jambulat.

16 Is that right, Mr. Tumposky?

17 MR. TUMPOSKY: There were two attachments, your Honor.

18 THE COURT: Attachments to the memorandum itself?

19 MR. TUMPOSKY: Two letters, yes.

20 THE COURT: Right, from James Tkhilaishvili and Mia  
21 Shvarts?

22 MR. TUMPOSKY: Exactly.

23 THE COURT: All right. So, we have those. And then  
24 with respect to David I have the defendant's Sentencing  
25 Memorandum, a Motion for Leave to File Late Objection to the

1 Final Presentence Report, and I think Probation has responded  
2 to that, Mr. Cruz, haven't they?

3 MR. CRUZ: Your Honor, I don't know that they have --  
4 well, they've responded with regard to the objection having to  
5 do with the monies. I think it was the \$11,000, or I believe  
6 it was the \$11,000.

7 THE COURT: Right. Well, is there anything else  
8 outstanding as a result of this late filing?

9 MR. CRUZ: I don't think so. I think everything is  
10 before the Court, your Honor, on that issue.

11 THE COURT: Okay. And I have received yesterday a  
12 collection of letters on behalf of David Tkhilaishvili.

13 MR. CRUZ: Yes, your Honor.

14 THE COURT: All right. So, have I identified all of  
15 the materials that I should have here, all the written  
16 materials?

17 MR. CRUZ: Yes, your Honor.

18 THE COURT: Okay. So, let me just perhaps frame the  
19 issue, although I obviously am not going to go anywhere until I  
20 resolve the judgment-of-acquittal issues.

21 But with respect to Jambulat Tkhilaishvili, I do not  
22 see that there are any objections that I need to resolve here,  
23 and what we are dealing with, by the numbers, is a Total  
24 Offense Level of 20 and Criminal History Category of I, which  
25 generates a guideline range of 33 to 41 months in prison, 1 to

1 3 years of supervised release, a fine of \$15,000 to \$150,000,  
2 and a \$200 Special Assessment. Is that shared numbers?

3 MR. TUMPOSKY: That is the applicable range, your  
4 Honor.

5 THE COURT: All right. And I take it, Mr. Tumposky,  
6 you and your client have fully discussed the Presentence  
7 Report?

8 MR. TUMPOSKY: Yes.

9 THE COURT: And, Ms. Kaplan, I take it you agree as  
10 well with respect to that?

11 MS. KAPLAN: Yes, your Honor.

12 THE COURT: So, then we turn to the question of David  
13 Tkhilaishvili, and here for guideline purposes I understand  
14 that the relevant guidelines are not disputed, although there  
15 are claims with respect to other matters embedded in the  
16 discussion. But the guideline range for David Tkhilaishvili is  
17 a Total Offense Level of 20, a Criminal History Category of II.  
18 That leads to a guideline range of 37 to 46 months, supervised  
19 release of 1 to 3 years, a fine of \$15,000 to \$150,000,  
20 restitution, which is embodied in the Government's amended  
21 proposed judgment here, of \$14,000, and a Special Assessment of  
22 \$400.

23 I guess I want to be sure, Mr. Cruz, that I do this  
24 properly. I do not think the objection to the Criminal History  
25 Category is an objection to the calculation; it is more an

1 objection to or suggesting that it overstates?

2 MR. CRUZ: That's absolutely right, your Honor.

3 THE COURT: Okay. And then with respect to the  
4 \$14,000 --

5 MR. CRUZ: Yes.

6 THE COURT: -- that is an objection to the guideline  
7 calculation?

8 MR. CRUZ: As a technical matter, your Honor, it is an  
9 objection, because it does affect the guideline for the  
10 embezzlement counts, although it doesn't affect the overall  
11 outcome, because that is not the guideline that controls under  
12 the grouping provisions.

13 THE COURT: All right. But I think we probably should  
14 take up the question of the calculation of restitution here as  
15 an initial matter or a threshold matter. So, let me  
16 understand, because I do not believe the Government has filed a  
17 Sentencing Memorandum, what the Government's recommendations  
18 are going to be.

19 MS. KAPLAN: With respect to both defendants, your  
20 Honor, the Government is asking for incarceration at the high  
21 end of the guidelines for each of them, for 3 years of  
22 supervised release, a Special Assessment with respect to David  
23 Tkhilaishvili of \$400, \$200 for Jambulat Tkhilaishvili, and  
24 restitution in the amount of \$14,000 as to David Tkhilaishvili,  
25 and fines for both, I believe, in the amount of -- I think it's

1       \$15,000, your Honor.

2               THE COURT: And am I correct that this is consistent  
3 with the current Administration's view that the guidelines are  
4 to be adhered to, that is, the guideline sentence is supposed  
5 to be imposed?

6               MS. KAPLAN: Yes.

7               THE COURT: That is going to be the Government's  
8 recommendation in virtually all cases under the new  
9 Administration, newish Administration?

10              MS. KAPLAN: I don't know, your Honor, but I did plan  
11 to articulate for you why I am asking for a high-ends guideline  
12 as to each.

13              THE COURT: Well, we will get to that.

14              So, let's go back, then, to Jambulat Tkhilaishvili and  
15 his Motion for Judgment of Acquittal as supplemented most  
16 recently in light of Burhoe. Do you want to speak to that now,  
17 Ms. Kaplan or not?

18              MS. KAPLAN: The Burhoe issue, your Honor?

19              THE COURT: Right.

20              MS. KAPLAN: Yes. I think that this is taking what --  
21 we're also trying to digest what the First Circuit said in that  
22 case, but I think it's taking what they said with respect to  
23 this matter way too far. The issue in Burhoe and the property  
24 in Burhoe was very different than here. It involved LMRDA  
25 rights as well as wages and benefits, and I think that what



1 happened was that the First Circuit felt that the Government  
2 did not identify what the property actually was. It was not  
3 the issue -- well, with respect to one victim, Eddie  
4 Flaherty --

5 THE COURT: But I am less concerned about the facts of  
6 Burhoe than the language that Judge Torruella used here, which  
7 is somewhat broad but does not directly address itself to these  
8 particular facts.

9 If I might frame it, number one, the property here is  
10 interest in the business, and that is something that is  
11 transferrable, that was the whole point, and it is something  
12 that was directed by the defendants through conspiracy here or  
13 attempted to be directed. That is the gist of the distinction,  
14 isn't it --

15 MS. KAPLAN: Yes.

16 THE COURT: -- between this and Burhoe?

17 MS. KAPLAN: Yes. And, specifically, that the  
18 property here, we know what the property was, and that with  
19 respect to some of it the property was supposed to go into  
20 David Tkhilaishvili's hands. So, we know exactly -- so, it  
21 went into the hands of the defendant. Now, with respect to  
22 whether --

23 THE COURT: But to be directed to somebody else.

24 MS. KAPLAN: Well, I believe there was also testimony  
25 that they wanted 40 percent of any of the -- that Mr. Torosyan

1 give up his priority distribution right, and that he give  
2 40 percent of any clinic funds available for distribution to  
3 David Tkhilaishvili. So, that's first, that there was a direct  
4 benefit to the defendants.

5 But also with respect to monies being directed or  
6 interest being directed to Saba, who was the third party, I  
7 think it's clearly distinguishable from Burhoe, because we know  
8 exactly where that money was going to go; whereas, in the  
9 Burhoe case it was not so clear where the property was going to  
10 go.

11 THE COURT: Well, as to the second part of it, the  
12 Government's position on this I assume in the wake of Burhoe,  
13 so long as the defendant exercises sufficient dominion and  
14 control over the property as to be able to direct it to  
15 whatever place he wants to direct it to, then --

16 MS. KAPLAN: Yes, that the law in Green is still the  
17 law.

18 THE COURT: The question that is raised by Burhoe, I  
19 suppose, is the reach and maybe underlined the continued  
20 vitality of Green, although not explicitly; nor could it be  
21 explicitly challenged by the First Circuit.

22 MS. KAPLAN: But, again, I think that part of the  
23 problem that they had was, as Mr. Tumposky says in his motion,  
24 that they say the Government couldn't show the defendant  
25 controlled the property and received an unidentifiable benefit.

1 They struggled with what exactly the property was in Burhoe as  
2 well, which led to some of the problem.

3 THE COURT: So, Mr. Tumposky, you have some language,  
4 not altogether clear as it applies to this case, from the Court  
5 of Appeals. It seems to me that the labor cases in the  
6 Hobbs Act context are going to generate some activity on the  
7 part of the Supreme Court ultimately. I do not know what the  
8 Government's intentions are with respect to Burhoe. There is a  
9 Second Circuit matter that is argued this month -- maybe it has  
10 already been argued as well -- but the labor cases are a little  
11 bit different from the kind of traditional Hobbs Act cases.

12 MR. TUMPOSKY: Well, they are different in the context  
13 that certain types of threats are perhaps more privileged in  
14 the labor context than they would be in a non-labor context.  
15 But in terms of the definition of "property" and what it means  
16 to obtain property, there is no distinction --

17 THE COURT: So, then, maybe we will look at it this  
18 way: Any question that there was property involved here, an  
19 interest in a business? That is not property?

20 MR. TUMPOSKY: No, that is.

21 THE COURT: And it is property that can be  
22 transferred?

23 MR. TUMPOSKY: Yes.

24 THE COURT: So, we don't have a property problem, or  
25 do we?

1 MR. TUMPOSKY: No. What we have is an obtaining  
2 problem.

3 THE COURT: So, now the obtainment problem, if I  
4 understand what you are saying, is it has to go directly to a  
5 defendant; is that it?

6 MR. TUMPOSKY: I would suggest that Burhoe could be  
7 read that way. It could also be read to suggest there must at  
8 least be a direct benefit to the defendant. It's not, quite  
9 frankly, 100 percent clear. In this case as to Jambulat  
10 Tkhilaishvili I disagree with the Government's contention that  
11 actually the testimony about splitting profits ever developed  
12 at trial. That was mentioned in some of the papers in the  
13 case, but I don't believe the victim ever testified to that.

14 THE COURT: Let's assume that it was not for a moment.  
15 If that is going to be critical, then we are going to get the  
16 transcript to deal with it first. But let's assume that it is  
17 simply this, which is I think the minimum model of what  
18 Ms. Kaplan was talking about, and that is the defendant or the  
19 conspirators or the leading conspirator directs that a piece of  
20 property go from one person to another and uses extortionate  
21 means to obtain that. Why isn't that within Hobbs Act?

22 MR. TUMPOSKY: Well, what Burhoe had was a situation  
23 where a union boss, I guess you would call him, threatened  
24 employees to get them to transfer certain wages and benefits to  
25 employees that he wanted to have those benefits.

1 THE COURT: Well, Burhoe went off on the earlier or  
2 the antecedent question -- went off in part on the antecedent  
3 question what was it that was being transferred here.

4 MR. TUMPOSKY: That's part of the question, yes.

5 THE COURT: And that is where it comes in the labor  
6 context, which has become perhaps ambiguous, perhaps was  
7 ambiguous from the beginning, but ambiguous now. But that does  
8 not seem to be the case here. We have got real property that  
9 is being directed by the conspirators. Whatever "right to  
10 wages" means in the context of Burhoe is not really relevant  
11 here.

12 MR. TUMPOSKY: Well, I think it's relevant because the  
13 Court identified that as a property interest, just the Court in  
14 -- excuse me, I'm blanking on the first case -- it's Sekhar and  
15 the other Supreme Court case, Scheidler, identified that there  
16 was a property interest and that the defendants in that case  
17 had attempted to deprive the victim of that property interest.

18 THE COURT: Well, no, I think it was a little less  
19 clear than that, and certainly such property interest as it  
20 existed was attenuated from the attainment dimension.  
21 Something else was going on other than the traditional transfer  
22 of property, I think, in this context.

23 So, here I am faced with this: There is property. I  
24 recognize that. The jury could have found that there was  
25 property, and I do too, and the defendant's conspiracy seeks to

1 direct that property to go to someone else. There may be more  
2 involved than Ms. Kaplan has alluded to. But on that minimum  
3 model I do not know how I can say that there is not a Hobbs Act  
4 violation in the non-labor context.

5 MR. TUMPOSKY: Because in the context of obtaining,  
6 your Honor, I don't think there is a distinction between the  
7 labor and non-labor context, and the Court seems to be and the  
8 First Circuit agrees that the Supreme Court is turning away  
9 from the sort of third-party extortion, that what you are  
10 describing is a crime of coercion, which is not covered by the  
11 Hobbs Act.

12 THE COURT: No. Well, I am not going to speak for the  
13 Supreme Court, but I have a feeling that the Supreme Court is  
14 speaking to particular kinds of concerns and particular kinds  
15 of activities. But I am not sure that the Supreme Court, when  
16 faced with what I will call "classic Hobbs Act extortion," is  
17 going to be indulgent of it.

18 The short of it is I do not see that as a grounds,  
19 certainly not a grounds I am going to take up. I would be less  
20 than candid if I did not recognize that this is a yeasty area  
21 now, become yeasty as a result of labor issues. Perhaps one  
22 way of looking at Enmons is Justice Stewart knew it when he saw  
23 it, but it was a little difficult for him to communicate  
24 precisely what the standards were for it.

25 That is all above my salary bracket. The short of it

1 is there is a Hobbs Act violation, it is at the core of this,  
2 and this is a classic, and I do not think, while there is some  
3 language in Burhoe that perhaps is somewhat Delphic if it is  
4 applied to other contexts, I do not see this as a case that is  
5 subject to acquittal on that ground.

6 So, is there anything else from your acquittal motion?

7 MR. TUMPOSKY: I have several other grounds, your  
8 Honor.

9 THE COURT: Do you want to talk to them a little bit,  
10 and I will see whether or not I want to hear from Ms. Kaplan  
11 about them?

12 MR. TUMPOSKY: So, the first issue that I raised  
13 initially was this issue of interstate commerce.

14 THE COURT: How can there be really any question about  
15 interstate commerce here? We are dealing with all kinds of  
16 commodities that are being used in interstate commerce.

17 MR. TUMPOSKY: No, we do, because the extortion was  
18 from a person, not from a business, your Honor.

19 THE COURT: But it is the impact under those  
20 circumstances, isn't it?

21 MR. TUMPOSKY: It is, but the fact that the business  
22 purchased drugs or supplies from out of state I don't think is  
23 relevant. The issue is whether there is sufficient proof that  
24 the depravation, if successful, would have caused an impact on  
25 interstate commerce because of the victim's connections to

1 interstate commerce, and the key issue here is the value of the  
2 asset that was sought. The evidence at trial was undisputed  
3 that the value of the clinic was then, and perhaps even still  
4 is now, worthless. They had not made a penny, in fact, they  
5 were losing money. At the time of trial they still had not  
6 turned a profit. And the victim himself testified, and I think  
7 the Court can credit this, should credit this as dispositive,  
8 that the clinic was worthless. And so, a transfer of a  
9 percentage of a worthless asset, a piece of paper, from one  
10 person to another, that's not going to impact interstate  
11 commerce.

12 THE COURT: Well, I think I understand the argument.  
13 I have to reject it. So, what else?

14 MR. TUMPOSKY: I think we addressed the two main  
15 arguments, your Honor.

16 THE COURT: All right. So, I am formally going to  
17 deny the Motion for Judgment of Acquittal by Jambulat  
18 Tkhilaishvili, after having considered as well the supplement  
19 and the new perspectives that are thrown on this by the Burhoe  
20 decision, but none of them satisfy me that there is not  
21 sufficient evidence here for a finder of fact to find, and I  
22 also find by a somewhat different standard, that all of the  
23 elements are met. I say a "somewhat different standard,"  
24 because, of course, it impacts the way in which I would have to  
25 evaluate the case for purposes of sentencing.



1           So let's, then, turn to the Motion for Judgment of  
2       Acquittal with respect to David Tkhilaishvili. I am not sure  
3       that as to Counts One and Two there is anything new that you  
4       have to add beyond what Mr. Tumposky offered.

5           MR. CRUZ: That's correct, your Honor. And, for the  
6       record, Mr. Tumposky had filed that supplement regarding the  
7       Burhoe decision yesterday. I just want to note for the record  
8       that I'm joining in that argument as well.

9           THE COURT: All right.

10          MR. CRUZ: Your Honor is correct with regard to Counts  
11       One and Two. With regard to Counts Three and Four having to do  
12       with embezzlement, your Honor, I would reiterate the argument  
13       that we made previously, which is that the issue of whether or  
14       not the clinic at the time of the embezzlement, Counts Three  
15       and Four, was a health care benefit program falls squarely on  
16       whether or not the clinic had been contracted with Medicare  
17       and --

18          THE COURT: If I can, what is the standard that you  
19       want to apply here, some sort of bright line when the contract  
20       is actually signed?

21          MR. CRUZ: Well, when the clinic itself starts  
22       receiving reimbursements for having treated patients.

23          THE COURT: But doesn't the case law out there suggest  
24       a much more functional approach to it; that is, if this would  
25       receive benefits then it comes within the scope?

1 MR. CRUZ: Well, I think in terms of the -- the  
2 embezzlement count is specific to November of 2015.

3 THE COURT: Right.

4 MR. CRUZ: And I think the issue as it was charged in  
5 that way is whether or not the clinic itself had contracted  
6 with these insurance carriers and was receiving these  
7 reimbursement payments at the time of the alleged offense  
8 conduct, and there's no evidence to support that, your Honor.

9 THE COURT: Well, did they ever receive reimbursement?

10 MR. CRUZ: They would have received reimbursement  
11 after they had received those letters in January and thereafter  
12 of 2016 indicating that the contracts with the insurance  
13 carriers had been approved. Then they could submit requests  
14 for reimbursement at that point.

15 THE COURT: So, the thrust of it is, if at the time  
16 that the service was rendered --

17 MR. CRUZ: Yes, your Honor.

18 THE COURT: -- there was not in place an enforceable  
19 agreement to pay for it --

20 MR. CRUZ: Yes, your Honor.

21 THE COURT: -- then it comes out -- from your  
22 perspective is outside of this kind of embezzlement?

23 MR. CRUZ: Yes, your Honor, because I don't think it  
24 can be defined as a health care benefit program if no benefit,  
25 quote, unquote, is passing to a patient and being reimbursed by

1 an insurance carrier.

2 THE COURT: Do you want speak to that?

3 MS. KAPLAN: Yes, your Honor. I don't know what case  
4 Mr. Cruz is referring to. The definition is in 18 U.S.C.  
5 Section 24(b), which defines a "health care benefit program,"  
6 and it clearly states that the contract just needs to be in  
7 place, and the contracts were in place as early as July for  
8 Medicare, the Medicare contract, and then in November came -- I  
9 believe it was November came the MassHealth.

10 THE COURT: All right. But let's just take the  
11 particular transactions that are involved here.

12 MS. KAPLAN: Okay. So, the \$5,000 and \$6,000 --

13 THE COURT: But those were not charged.

14 MS. KAPLAN: They were not charged.

15 THE COURT: So, let's talk about the ones that were  
16 charged first. Then we will go to the other ones.

17 MS. KAPLAN: Okay. So, those were monies that  
18 Mr. Tkhyilaishvili took, I believe, in November, and so there  
19 was two contracts in place.

20 THE COURT: So, if I may, any time he takes money and  
21 the business is related in some fashion to a health care  
22 program, then that is subject to embezzlement?

23 MS. KAPLAN: Yes, as long as the definition of 24(b)  
24 is met, which is that there is a contract in place, and it says  
25 "which payment may be made under the plan or contract." "May

1 be made." There is nothing that says that payments or  
2 reimbursements have to have been made. There has to be a  
3 contract in place, and there were.

4 THE COURT: Would the clinic at that time have a right  
5 to enforce payment on its services?

6 MS. KAPLAN: Yes, I believe so.

7 THE COURT: How?

8 MS. KAPLAN: From the time that the contract is signed  
9 and in place, from the time they get an executed contract with  
10 Medicare or with Harvard Pilgrim, if they have rendered  
11 services after that time period --

12 THE COURT: Why was there the lag?

13 MS. KAPLAN: What lag?

14 THE COURT: The lag between this kind of payment and  
15 the authorization right. Let me just understand that more  
16 fully.

17 MS. KAPLAN: I'm not sure I'm following your question.

18 THE COURT: Well, you have got a payment made on  
19 November 3rd of \$1,500; then you have a payment made of \$2,000.  
20 You do not have any income coming in from the insurers, right,  
21 during that time period?

22 MS. KAPLAN: Okay.

23 THE COURT: Did we have evidence that, in fact, there  
24 were payments made thereafter?

25 MS. KAPLAN: So, there had been clients seen who had

1 submitted claims and that Allied Health would have gotten  
2 reimbursed, you mean?

3 THE COURT: Yes.

4 MS. KAPLAN: As I am sitting here right now, I can't  
5 remember if we did have that evidence.

6 THE COURT: Well, let's assume that they did not, not  
7 that I am saying that they did not. Let's assume that they did  
8 not, and so what we have is a contractual provision that says  
9 "may be paid" is the triggering event.

10 MS. KAPLAN: Yes.

11 THE COURT: And here they have a contract that says,  
12 "We could be paid," but no evidence that they were, in fact,  
13 paid.

14 MS. KAPLAN: I believe that the evidence was --

15 THE COURT: I am assuming for a moment that there was  
16 not.

17 MS. KAPLAN: That there were not. I still think that  
18 it's money that's available to them under a health care benefit  
19 program, and those monies are health care monies.

20 THE COURT: So, a "health care benefit program," if I  
21 understand it from your perspective, is a business that has  
22 contracts with one of these entities to receive reimbursement?

23 MS. KAPLAN: It "means any public or private plan or  
24 contract...under which any medical benefit, item or service is  
25 provided to any individual."

1 THE COURT: "Is provided."

2 MS. KAPLAN: Right. And then it says "any individual  
3 or entity who is providing a medical benefit..." and ..."which  
4 payment may be made under the plan or contract."

5 THE COURT: How do I know that they were providing to  
6 an individual a medical benefit for which payment would be  
7 made?

8 MS. KAPLAN: Well, that was what the business was.  
9 They weren't doing anything else. And I believe there was  
10 testimony that they started seeing patients in November, so  
11 they were providing health care benefits.

12 THE COURT: If they were not.

13 MS. KAPLAN: If they weren't providing health care  
14 benefits?

15 THE COURT: I am asking more a factual-sufficiency  
16 question.

17 MS. KAPLAN: Right. I still think that whatever  
18 monies are there in that account, once they have those  
19 contracts in place, they are a health care benefit program,  
20 regardless of whether they have opened their doors and started  
21 seeing patients or not. Those monies are dedicated to and  
22 devoted to a health care program.

23 THE COURT: Where did the monies come from?

24 MS. KAPLAN: Victor Torosyan.

25 THE COURT: So, these are misapplications of monies,

1 funds, securities, premiums...or other assets of a health care  
2 program, and they are assets because they are capital that is  
3 provided by Mr. Torosyan?

4 MS. KAPLAN: Yes.

5 THE COURT: Do you want to speak to that?

6 MR. CRUZ: Your Honor, just briefly. The contracts  
7 are not in place until after the first of the year, January in  
8 2016.

9 THE COURT: Well, what was signed in July?

10 MR. CRUZ: What was done in July is applications were  
11 made with regard to Medicare, and then there was a later  
12 application to Harvard Pilgrim Health that was contingent on  
13 Department of Public Health certification.

14 THE COURT: So, the point, I guess, is that you have  
15 triggering events, and your triggering event is approval of the  
16 application; is that it?

17 MR. CRUZ: Triggering event, yes, is approval of the  
18 application. At that point I would suggest that reimbursements  
19 can be made upon request by the clinic. As the Court noted --

20 THE COURT: Don't they do *nunc pro tunc*?

21 MR. CRUZ: In terms of paying back, if you will, for  
22 services provided?

23 THE COURT: Right.

24 MR. CRUZ: Again, your Honor, how the Court looks at  
25 the evidence, I don't think there was any evidence provided to

1 the Court about that --

2 THE COURT: Well, okay. So, let me just suggest this  
3 with respect to this aspect of it, which is I think facts are  
4 important on this one. I want to have the Government's  
5 response as to these two counts, and I think -- well, there is  
6 going to be a record created, so it should be the record, and  
7 the Government can show me the evidence that you rely upon, and  
8 Mr. Cruz can more clearly identify what -- not more clearly --  
9 but with reference to the evidence actually submitted what we  
10 do with Counts Three and Four.

11 MS. KAPLAN: I don't have a problem with that, your  
12 Honor. I don't have the exhibits in front of me, but they were  
13 in evidence before this jury.

14 THE COURT: I understand there is a dispute about them  
15 and a larger dispute that I think I would like to have  
16 developed.

17 MS. KAPLAN: Okay.

18 THE COURT: I think it is possible to take the  
19 position -- I think it is possible to argue the position that  
20 there has to be a triggering event. You are essentially saying  
21 the triggering event is when they applied for this, right?

22 MS. KAPLAN: No, I'm not. I'm saying --

23 THE COURT: Then, that is why I go back to this  
24 earlier question. Assume that they rendered these services at  
25 this time and then sought reimbursement at that time. Could



1       they be paid?

2               MS. KAPLAN:   Okay.   That I would have to look at the  
3       contracts for, because I have a recollection that those  
4       contracts do, in fact, address that issue.   But the triggering  
5       event that we used was there was actually a contract in place,  
6       and the evidence that we submitted, the Medicare, is a  
7       contract, and it says, Medicare said, "You can now start  
8       providing services, and we will reimburse you."   That's in  
9       July.   And the second contract --

10              THE COURT:   I would really have to look at it.

11              MS. KAPLAN:   Okay.

12              THE COURT:   You say so.   I do not have a clear  
13       recollection about it, and this may turn on precisely that.

14              MS. KAPLAN:   Okay.

15              THE COURT:   So, how long do you need to respond to it?

16              MS. KAPLAN:   I can get it to you early next week, your  
17       Honor.

18              THE COURT:   Okay.   So, we will deal with that part of  
19       it.   I think I may, however, address the question of sentencing  
20       here, at least preliminarily, because I am not sure that it  
21       turns on this, apart from the restitution, which we will get to  
22       in just a second.   Does it?   It does not drive the guidelines,  
23       does it?

24              MR. CRUZ:   Your Honor, you are correct.   Counts One  
25       and Two, the Attempted Extortion and Conspiracy, are what

1 drives the guidelines here.

2 THE COURT: And this is in addition to it.

3 MR. CRUZ: Mm-hmm.

4 THE COURT: All right. So, let's talk about the, what  
5 is it, \$6,000 and \$5,000 checks?

6 MR. CRUZ: Yes, your Honor.

7 THE COURT: Not that it is necessary, but why didn't  
8 you charge it?

9 MS. KAPLAN: Because we didn't realize at the time  
10 that there was a Medicare contract that had already been  
11 signed. We didn't have --

12 THE COURT: But you must have for purposes of the  
13 other, Counts Three and Four.

14 MS. KAPLAN: We did, and that came later, because we  
15 had the Harvard Pilgrim contract, which I believe was signed in  
16 November. Whatever contract we had I believe was in November.  
17 That's why we charged the November amounts. It was completely,  
18 you know, an oversight that we just didn't have that contract  
19 or didn't realize that Medicare was, in fact, in effect as  
20 early as July, and then the \$5,000 and \$6,000 came afterwards.

21 THE COURT: Well, let me go back to that, then. So,  
22 this is depending on the Medicare contract, which is contingent  
23 on the discussion that we have had already here --

24 MS. KAPLAN: Yes.

25 THE COURT: -- that I want more on that to get it

1 clarified.

2 But let me understand from Mr. Cruz, assume that this  
3 is a Medicare contract. Why isn't it related?

4 MR. CRUZ: Assuming that it is -- well, your Honor,  
5 it's not related because I don't believe that it is -- and if  
6 we're talking about relevant conduct for purposes of the  
7 guidelines, there is --

8 THE COURT: We are thinking about two things. We are  
9 thinking, number one, about relevant conduct for purposes of  
10 the guidelines. That drives the number a bit.

11 MR. CRUZ: Yes, your Honor.

12 THE COURT: The second is forfeiture.

13 MR. CRUZ: Yes, your Honor. And, again, I think those  
14 are separate issues. If I can deal with the relevant conduct  
15 issue first?

16 THE COURT: Sure.

17 MR. CRUZ: The argument that I would make to the  
18 Court, essentially, is that the evidence before the Court that  
19 was placed to the jury on those issues, again, the jury didn't  
20 pass on them because they are not charged conduct, but the  
21 Court heard conflicting evidence about whether that amount of  
22 money, the \$11,000, was lent to Mr. Tkhilaishvili or whether he  
23 took it without Mr. Torosyan's knowledge and/or authorization.  
24 And if the standard is the Government at this point has to  
25 prove to the Court at a sentencing hearing under a

1 preponderance of the evidence that this was somehow related to  
2 the offense conduct, I don't think they have made that  
3 threshold showing based on the inconsistencies not only from  
4 the testimony --

5 THE COURT: Then, that is a question of factfinding by  
6 me.

7 MR. CRUZ: Yes, your Honor.

8 THE COURT: Do I rely upon the testimony of  
9 Mr. Torosyan? Do I find it credible?

10 MR. CRUZ: Yes, your Honor. It's the testimony of  
11 Mr. Torosyan, which I recall was that he said on the stand he  
12 didn't know about Mr. Tkhilaishvili taking the money. Then  
13 there is the testimony of Special Agent Keith Nelson, who took  
14 a statement from Mr. Torosyan stating that the money was lent  
15 to Mr. Tkhilaishvili in the exact same increments, \$5,000 and  
16 \$6,000, totalling \$11,000. Then the Government presented a  
17 prior consistent statement where Agent Koch testified that he  
18 reiterated that or stated at that point at a later date that  
19 the monies were taken by Mr. Tkhilaishvili, that he didn't  
20 authorize it.

21 I would suggest to the Court those are the facts. The  
22 Court can look at the prior consistent statement as, I would  
23 argue, less credible than the initial statement when the  
24 information was fresh in Mr. Torosyan's mind and he's telling  
25 Agent Nelson --

1           THE COURT: Maybe you will remind me of the chronology  
2 here.

3           MR. CRUZ: Yes, your Honor.

4           THE COURT: Mr. Torosyan is interviewed by -- I forget  
5 the other agent's name.

6           MR. CRUZ: Agent Nelson.

7           THE COURT: Nelson. On what date?

8           MR. CRUZ: That is February 5th of -- I'm sorry -- the  
9 report is dated February 5th, 2016.

10          THE COURT: And the interview with Agent Koch is when?

11          MR. CRUZ: That is March 14th, 2016.

12          THE COURT: So, about a month later?

13          MR. CRUZ: Yes, your Honor.

14          THE COURT: About, I should say, 13 months later; is  
15 that right? March of 2015?

16          MR. CRUZ: I'm sorry, your Honor. February 5th, 2015  
17 to March 14th, 2016.

18          THE COURT: Okay. So, a month later. All right.

19          MS. KAPLAN: And I believe there was a second prior  
20 consistent statement. I believe that there were two.

21          THE COURT: Let me tell you again I am not going to  
22 pretend that I have mastered this, and I want to see the  
23 transcript references to this.

24          MR. CRUZ: Yes, your Honor.

25          THE COURT: So, this is stuff that you should get the

1 transcript on, I think.

2 MR. CRUZ: Mm-hmm.

3 THE COURT: This is kind of for the Government as  
4 well. Get what you think is necessary for me to resolve these  
5 kind of factual questions.

6 MR. CRUZ: Yes, your Honor.

7 THE COURT: So, we will put both the embezzlement and  
8 the restitution forfeiture to one side for a moment.

9 MR. CRUZ: That's fine, your Honor. But with regard  
10 to the criminal forfeiture, there is one thing that I want to  
11 add, that the statute that's referenced by the Government in  
12 its request is 982(a)(7), and that specifically references a  
13 Federal health care offense, and what I just want to note for  
14 the Court is that the item that is subject to forfeiture has to  
15 be "derived, directly or indirectly, from gross proceeds  
16 traceable to the commission of the offense," and I believe that  
17 references the offense of conviction that is stated in the  
18 Indictment.

19 THE COURT: So, I am going to let you brief that as  
20 well --

21 MR. CRUZ: That's fine, your Honor.

22 THE COURT: -- as an opposition to the Amended Motion  
23 for Forfeiture --

24 MR. CRUZ: Yes, your Honor.

25 THE COURT: -- which was filed, I believe, yesterday.

1 MR. CRUZ: Yesterday. Yes, your Honor.

2 THE COURT: So, let's sort through the schedule for  
3 these two aspects of it, although I want to hear argument from  
4 both parties as to sentence.

5 MR. CRUZ: Yes.

6 THE COURT: I want to get this so I am not getting  
7 bits and pieces and it is coming at more or less the same time.  
8 Ms. Kaplan said that she would be able to get this to me next  
9 week, but there is evidentiary material I think that has to be  
10 developed on aspects of it. So, what is a more realistic time  
11 for it?

12 MS. KAPLAN: Well, if we need to get the transcript,  
13 I'm not sure so.

14 THE COURT: In the ordinary course the transcript  
15 would be a month?

16 THE COURT REPORTER: Yes.

17 THE COURT: So, assume that the transcript ordered  
18 today is available to you on the 16th of October, that is  
19 Monday, the 16th, then can you have a response by October 23?

20 MS. KAPLAN: On all the issues?

21 THE COURT: On all the issues, yes.

22 MS. KAPLAN: Yes.

23 THE COURT: Okay. Then, Mr. Cruz, October 30 for  
24 response.

25 MR. CRUZ: That's fine, your Honor. Thank you.

1           THE COURT: And then with respect to the narrower  
2 issue or separable issue of the forfeiture amendment I think it  
3 is probably better for you to file your opposition, Mr. Cruz,  
4 by the 28th.

5           And then, Ms. Kaplan, you can respond -- what did I  
6 have, the 23rd, October 23rd, for the other --

7           MS. KAPLAN: November 23rd?

8           THE COURT: October 23rd, didn't I, for the --

9           MS. KAPLAN: He's filing October 28th.

10          THE COURT: No, he is going to file on September 28th.

11          MS. KAPLAN: Oh, September 28th.

12          MR. CRUZ: That's fine, your Honor.

13          THE COURT: Yes. I am just trying to give you one  
14 date to remember.

15          MS. KAPLAN: Okay. On 10/23 I will respond to that.

16          THE COURT: Yes. And you will get a reply on 10/30.

17          What we do by way of rescheduling -- well, I want to  
18 hear preliminary argument. I think it is not appropriate for  
19 me to sentence Jambulat Tkhilaishvili and not David at the same  
20 time, because they are comparators, and I do not want to have  
21 dealt with Jambulat without dealing with David.

22          But let me understand the Government's position with  
23 respect to at least so much as deals with the conspiracy and  
24 the attempted extortion.

25          MS. KAPLAN: So, do you want me to start with Jambulat



1 or --

2 THE COURT: Both.

3 MS. KAPLAN: -- both?

4 THE COURT: It is just that I am not going to be  
5 ruling on both of them today.

6 MS. KAPLAN: I understand. Okay. So, I'll start with  
7 David Tkhilaishvili. And, again, the Government understands  
8 that the Court has to look at the sentencing factors under  
9 3553(a) in fashioning a sentence which is sufficient but not  
10 greater than necessary to comply with the purposes of the  
11 *Sentencing Guidelines*. And, as I said, we are recommending a  
12 sentence at the high end of the guidelines, and I will explain  
13 why.

14 Looking at the nature and circumstances of this  
15 offense, there's no question that the crime of extortion, in  
16 general, is a serious offense and, in particular, this one.  
17 Your Honor, you presided over the trial. You heard about the  
18 defendants' conduct. With respect to the victim in this case  
19 and the threats to harm him, to harm his family, to burn his  
20 business down, this defendant made a decision to take the law  
21 into his own hands and to take property from the victim that  
22 was not his.

23 Looking at this particular defendant and his  
24 particular role in the offense, we believe that a sentence at  
25 the high end of the guidelines is appropriate for these

1 reasons: First, the defendant threatened the victim's family,  
2 and under *United States Sentencing Guidelines*, Section 2B3.2,  
3 Application Note 8, it says that if the offense involved a  
4 threat to a family member of the victim an upward departure may  
5 be warranted. So, I am not asking for an upward departure, but  
6 I am asking for a high end of the guideline sentence.

7 Second, immediately prior to the trial your Honor may  
8 recall that the defendant reached out to a witness in the case  
9 in direct violation of the Court's Order not to have contact  
10 with any witnesses. He, in fact, gave this witness money,  
11 which the Government views as an attempt to tamper with a  
12 witness.

13 Similarly, your Honor may recall that after that  
14 occurred and during the trial this defendant again disobeyed  
15 your Honor's instructions and order not to have contact with  
16 any witnesses or persons connected with the case, and he  
17 approached the person that had come to court with Mr. Torosyan  
18 and told him that Mr. Torosyan was a liar; and we, again, view  
19 this as yet another attempt to intimidate this individual as  
20 well as Mr. Torosyan in direct contradiction to your order.

21 And, finally, your Honor, you may recall that when the  
22 agents arrested the defendant on your arrest warrant for having  
23 been in violation of the conditions of release, which was that  
24 he not contact the witnesses, he specifically threatened to  
25 kill the case agent.

1           This defendant has no respect or regard for the law,  
2           and the way that he behaved before and during trial, as well as  
3           the tapes in this case where he says he has no respect for the  
4           law, indicate that he believes he's above the law.

5           In the letters from the defendant's family that were  
6           submitted, they seem to be under the impression that David  
7           Tkhilaishvili funded Allied Health, when the evidence at trial  
8           was completely undisputed that Allied Health was completely  
9           funded by Victor Torosyan.

10           And moreover, even in Mr. Cruz's arguments to the  
11           Court in the Sentencing Memo the defendant accuses the victim  
12           of having taken his business, a business that was entirely  
13           funded by the victim, a man who the evidence showed had come to  
14           this country with no money. He took the defendant under his  
15           wing, he treated him like a son and on numerous occasions he  
16           gave him money and gifts. The defendant did nothing to thank  
17           the victim in this case for his generosity both with respect to  
18           person loans and the gifts as well as funding Allied Health,  
19           and he used the victim's money which funded Allied Health as  
20           his own personal bank account.

21           What he did was to use threats of physical violence to  
22           try and steal what was not his and threats not only to his own  
23           life but to that of the family and business of Mr. Torosyan.  
24           He has left the victim in this case, who did not want to come  
25           to court today, but I believe did submit a letter -- I hope the

1 Court has seen it -- but he has left him --

2 THE COURT: I don't believe I have.

3 MS. KAPLAN: Oh.

4 THE COURT: I don't know if it is on file.

5 MS. KAPLAN: We did give that to Probation. I have a  
6 copy, if your Honor --

7 THE COURT: Why don't you pass it up.

8 (Document provided to the Court by Ms. Kaplan)

9 THE PROBATION OFFICER: Your Honor, I believe it may  
10 have been attached with the final disclosure of the Presentence  
11 Report, but I do not recall if it, in fact, was attached or  
12 not.

13 THE COURT: It is not in the copy that I had.

14 THE PROBATION OFFICER: My apologies to the Court.

15 MS. KAPLAN: So, as you can see from this letter, this  
16 is -- and you saw from his testimony, your Honor -- this is a  
17 man who had come to this country with nothing, he built up  
18 these businesses, and he is now a shattered man who has been  
19 caused great emotional distress and financial injury by David  
20 Tkhilaishvili.

21 And the defendant in his papers shows no remorse for  
22 any of the conduct. The Government submits that he is a con  
23 man. He uses people. He takes things by threat, things that  
24 are not his. He refers to himself in his letter as a person  
25 who has always shown respect for people, yet the evidence at

1 trial showed otherwise. With respect to how he treated Victor  
2 Torosyan, your Honor heard the words for yourself on the tapes.  
3 The jury also heard from two other witnesses who were employees  
4 of Allied Health who testified that the defendant got so angry  
5 at them he threw a table over and went to hit Kenton Fabrick.  
6 This was witnessed also by Olga Dorofyeyeva. On another  
7 occasion these witnesses reported that the defendant had hit  
8 his former girlfriend, Kristina, also while at work, also while  
9 Mr. Tkhilaishvili was in a fit of rage.

10 And these are the reasons, your Honor, that the  
11 Government believes that a sentence at the high end of the  
12 guideline range is necessary. This sentence will promote  
13 respect for the law. It will deter this defendant from  
14 engaging in further criminal conduct. It will tell him that he  
15 cannot take the law into his own hands, and he cannot when he  
16 gets angry threaten to kill people and extort them. It will  
17 protect the public from further crimes of this defendant, and  
18 it will send a message that threats to cause physical harm  
19 cannot be used to settle business disputes, and such conduct  
20 will be prosecuted.

21 We believe that a sentence of 46 months is not greater  
22 than necessary, but it is sufficient to protect the public and  
23 send a message to the defendant.

24 THE COURT: To what degree is your recommendation  
25 inflected by the embezzlement dimension to it?

1 MS. KAPLAN: It's not, your Honor. It's not at all.

2 THE COURT: And I will hear you as to Jambulat as  
3 well.

4 MS. KAPLAN: Okay. Sorry. Again, using the 3553(a)  
5 factors in fashioning his sentence, the Government also  
6 believes a sentence at the high end of the guideline range is  
7 appropriate in this case. Again, there's no question of the  
8 seriousness of this offense, and, again, your Honor heard the  
9 facts in this case. In the defendant's Sentencing Memorandum  
10 he tries to pin all of the responsibility on his younger  
11 brother who he claims to have just been following. He claims  
12 he's done this all his life. He came to this country to follow  
13 his younger brother.

14 But short of actually writing checks to himself and  
15 embezzling the money from Allied Health, this defendant was  
16 with his brother and was in lockstep every step along the way  
17 of this conspiracy to extort Allied Health, including  
18 threatening to harm the victim, Victor Torosyan. He even at  
19 one point met with Victor Torosyan when David Tkhilaishvili  
20 wasn't here.

21 Your Honor also heard about the threats made to  
22 another witness, Olga again, that if she wronged him he would  
23 cut her.

24 Jambulat Tkhilaishvili argues that his family needs  
25 him and depends on him, but the Government submits that he

1     should have thought about that before he entered into a  
2     conspiracy with his brother to extort Mr. Torosyan.

3             We believe that the sentence of 41 months will promote  
4     respect for the law. It will deter specifically this defendant  
5     as well as the general public. It will send a message of  
6     deterrence that you simply cannot use threats of physical harm  
7     to settle business disputes.

8             And we believe, again, that 41 months is not greater  
9     than necessary, but it is sufficient to protect the public and  
10    send a message to the defendant.

11            THE COURT: All right. So, I have the defendant's  
12    Sentencing Memorandum, but I think for present purposes, so  
13    that this is not left unanswered here, what I would frame is  
14    simply this: Assume that I believe Mr. Torosyan. How do I  
15    treat the threats? Whiskey talk? What is it?

16            MR. CRUZ: Well, your Honor, with regard to David  
17    Tkhilaishvili, I think the Court had actually during the course  
18    of trial also referenced the conversations as, quote, unquote,  
19    ragtime.

20            THE COURT: It is, but just so you know what you are  
21    dealing with --

22            MR. CRUZ: Yes, your Honor.

23            THE COURT: -- they were instinct with menace.  
24    Whatever the linguistic rigor was of those conversations there  
25    is no question in my mind that what was attempted to be

1 delivered was threats of physical harm, not merely to  
2 Mr. Torosyan, but to his family. So, assume that that is the  
3 case and delivered in ragtime syncopation. But there is  
4 melody, and then there are lyrics, and the lyrics were  
5 menacing. What am I supposed to do with that? Do I treat it  
6 as someone who is volatile? Is that it? That is really what I  
7 am asking about here.

8 MR. CRUZ: And I would say no to that question, your  
9 Honor, and the reason for that is because the Court can look at  
10 this from the perspective of what started the entire dispute  
11 here, which was what is going to happen with this business in  
12 terms of the ownership. That doesn't take away from the  
13 severity of threats, but what I would suggest to the Court is  
14 that those threats, quote, unquote, have to be measured by the  
15 actions and activities of the person who the threats were  
16 directed to.

17 THE COURT: Yes, but the person who the threats were  
18 directed to was not suggesting physical harm as his means of  
19 resolving the conflicts.

20 MR. CRUZ: No, he wasn't, your Honor. And, again, how  
21 severe the Court looks at the threats depends I think to some  
22 extent on the reaction of the person who the threats are  
23 directed to, and I think the evidence in the case is clear  
24 that, despite these threats being made, Mr. Torosyan continued  
25 to work with not only David but his brother James for a lengthy



1 period of time. In addition, he allowed David access to his  
2 home in Mashpee, despite the fact that these threats, quote,  
3 unquote, were made to him personally and to his family. And I  
4 would suggest to the Court that the jury could have found,  
5 obviously, any type of threat was made in order for the  
6 enhancement to the base Offense Level to be made. I believe  
7 the footnote to that particular guideline section states that a  
8 threat to property would be sufficient to trigger that  
9 two-level enhancement from the base Offense Level of 18.

10 THE COURT: So, I look at this and say it is somewhat  
11 perplexing that Mr. Torosyan stayed on. On the other hand,  
12 given the threats, it might have been thought to be a good  
13 career move, too. So, I am supposed to look at this and say  
14 David had reason to be upset, he delivers these threats, they  
15 must not have been so serious or Mr. Torosyan would not have  
16 continued in his relationship with him?

17 MR. CRUZ: I think that there would have been more of  
18 a response along those lines. And, again, not taking away or  
19 disrespecting the decision of the jury, but obviously they  
20 found that something happened here that was an attempt to  
21 coerce or to force Mr. Torosyan to do something he didn't want  
22 to do, and I think that has to be seen from the perspective of  
23 not only the, quote, unquote, threats themselves and  
24 Mr. Torosyan's reactions to them after the fact, but also it  
25 has to be couched in their relationship, which at that point

1 was a decade old.

2 Mr. Torosyan well knew who he was dealing with when he  
3 entered a business relationship with Mr. Tkhilaishvili. He  
4 knew about all of the problems that he had had with regard  
5 to --

6 THE COURT: But had not been the subject of threats,  
7 or even was there any evidence that he was aware that David  
8 Tkhilaishvili had anger-management problems?

9 MR. CRUZ: And, again, your Honor, if he knew those  
10 things he could have disassociated himself with  
11 Mr. Tkhilaishvili at a much earlier point.

12 THE COURT: But he did not. The point is he did not,  
13 or at least there is no evidence that he did.

14 MR. CRUZ: Yes, your Honor. And he didn't do that  
15 over the course of eight to ten years because he felt that he  
16 couldn't do that. He did that because he knew this man very  
17 well. He knew what he was --

18 THE COURT: What I guess I am getting at is this was  
19 the first occasion on which, in the evidence anyway, the first  
20 occasion on which he was exposed to this side of  
21 Mr. Tkhilaishvili.

22 MR. CRUZ: Yes, which I would suggest to the Court  
23 perhaps on prior occasions he had shrugged off as  
24 Mr. Tkhilaishvili, this is his character, this is how he acts,  
25 these are the things that he says, he doesn't always mean what

1 he says. But now we're dealing with a business relationship  
2 where money is at stake, and, "He is saying things to me in  
3 order for me to do something I don't want to." I think that's  
4 the context of it.

5 But, again, your Honor, he would have disassociated  
6 himself with Mr. Tkhilaishvili at a much earlier point if he,  
7 in fact, was in fear of him or had any reservation whatsoever  
8 about his safety or the safety of his family. He certainly  
9 wouldn't have entered into a business relationship with him,  
10 but he knew him well enough at that point to trust that this  
11 was a good decision for him.

12 THE COURT: Well, there are several different points  
13 in time, but I think I understand that. Is there anything else  
14 that you would like to talk to at this point? I simply want to  
15 be sure that I have got the tenor.

16 MR. CRUZ: Yes, your Honor. And just to get back to  
17 what we were just discussing, I think that's an argument  
18 generally that the case to a certain extent can be taken out  
19 of, if the Court will, the heartland of these types of cases  
20 where there is a direct threat made to an individual, where  
21 there is violence exerted upon an individual in order to force  
22 them to do something. It is not an indirect situation,  
23 necessarily, where you are saying at one point that you are  
24 going to do something and then you're saying, "Well, I wouldn't  
25 do that to you," that sort of thing. There may be some

1 distinction that the Court can make under the circumstances,  
2 given the prior relationship and what happened with these two  
3 men during the course of the offense conduct that I just want  
4 the Court to consider.

5 THE COURT: All right.

6 MR. CRUZ: In addition to that, your Honor, with  
7 regard to the 3553(a) factors, just the points that I highlight  
8 in my Memorandum, including the effect that this will have on  
9 his family and on his future in terms of his fiancée. His  
10 parents are here in court. They rely on him. They rely on his  
11 brother. Any extended period of imprisonment certainly affects  
12 them in terms of their financial and emotional well-being.

13 THE COURT: Well, but this is the not-uncommon  
14 circumstance in which a defendant attempts to hold other people  
15 hostage to his misfortune. I am not sure that that is  
16 necessarily going to be persuasive to me. These turn out to be  
17 other victims of his crime.

18 MR. CRUZ: And I state these things as part of his  
19 background and circumstances, your Honor.

20 In addition to that, I highlight his health situation,  
21 which has suffered to a certain extent while he has been held  
22 in custody. He is a diabetic, and my understanding from  
23 reviewing information from the Plymouth County facility, is  
24 that, not only has he experienced a somewhat appreciable weight  
25 loss because of the situation, but also the treatment that he

1 is receiving isn't effectively treating his condition.

2 THE COURT: That is Plymouth County. That is not the  
3 Bureau of Prisons.

4 MR. CRUZ: I understand that, and I am highlighting  
5 that only to the extent that under the 3553(a) factors the  
6 Court has to consider the administration of medical treatment  
7 in the most effective manner, and what I am suggesting to the  
8 Court is that it's not just an issue of whether medical  
9 treatment is available within the BOP, it's an issue of whether  
10 or not that is going to address the issues that he is currently  
11 dealing with.

12 THE COURT: Well, but I think that you have to address  
13 who is going to be administering it post-conviction here.

14 MR. CRUZ: Yes, your Honor.

15 THE COURT: And that is the distinction I think I am  
16 drawing between them. And I am not necessarily agreeing that  
17 there has been less-than-adequate medical services at Plymouth  
18 County, but that is a different kind of facility than the  
19 facilities that are available in the Bureau of Prisons, which  
20 for whom diabetes is not an unknown circumstance among inmates.

21 MR. CRUZ: No, I understand that, your Honor. And,  
22 again, it's a consideration for the Court in terms of  
23 medical-treatment issue.

24 In addition to that, your Honor, I do highlight, and  
25 this may go back to the point the Court just made, the issue of

1 his business and his employees. That's also affected  
2 negatively by any prolonged incarceration.

3 I would also ask the Court to consider in terms of the  
4 case itself that it isn't necessarily effective to sentence a  
5 man for a lengthy period of time. He has been in prison just  
6 about five months, a little over five months at this point.  
7 This is the first incarceration that he has dealt with. In  
8 terms of sending a message to him and others who are similarly  
9 situated, he has certainly learned from this experience, as he  
10 stated to the Court in the letter that he provided. This is  
11 not something that he wants to be a prolonged experience, and  
12 it is not something that he would repeat and risk in the  
13 future.

14 This situation is limited, I would suggest, to the  
15 relationship that he had with Mr. Torosyan. But for that  
16 relationship I would suggest there may not have been an issue  
17 with anyone else, your Honor, in the sense that the  
18 relationship itself --

19 THE COURT: I do not understand that. He has a close,  
20 ten-year relationship with somebody, and he nevertheless  
21 engages in these kinds of threats? What does he do for people  
22 he doesn't know very well? That is the flip side of the  
23 argument, which you may want to address at a certain point.

24 MR. CRUZ: Yes, your Honor. But, again, just that  
25 that is what it is rooted in, is this prior relationship, and

1       that is why the Court should look at it with regard to being a  
2       unique set of circumstances as opposed to a general behavioral  
3       trait of Mr. Tkhilaishvili's.

4               So, those are the things that I would want to  
5       highlight for the Court.

6               THE COURT: All right. I will keep them in mind.

7               Mr. Tumposky, anything that you want to address?

8               MR. TUMPOSKY: So, to answer the Court's question,  
9       your Honor, about how do you evaluate the threats as it relates  
10      to Jambulat, I think one way to do it is look at the rest of  
11      his life. He is someone who's 47 years old with no criminal  
12      record.

13              THE COURT: What do I do about the slashing of -- I  
14      forget her name now -- or the proposed cutting?

15              MR. TUMPOSKY: Well, you know, I addressed it my memo,  
16      and I think I'm somewhat at a disadvantage because of the  
17      trial. That came in for a very limited purpose.

18              THE COURT: Well, it came in for a limited purpose  
19      because I had to instruct the jury that that is not going to  
20      affect their judgment about making liability, but it does  
21      affect mine --

22              MR. TUMPOSKY: Well, understood.

23              THE COURT: -- in formulating a sentence.

24              MR. TUMPOSKY: But my point is that, because it came  
25      in for that purpose, it wasn't really the forum in which I

1       could possibly address the allegation.

2               THE COURT: Well, let me suggest that this probably  
3       will be the forum in which you are going to be addressing at  
4       least that to some degree.

5               MR. TUMPOSKY: And what I am saying is that, if I had  
6       had the opportunity to do so at the trial or now, he would say  
7       it didn't happen, and so what more can I say at this point,  
8       unless we want to have another trial?

9               THE COURT: I am not sure that changes very much, does  
10      it? This is not a kind of Catch 22, but I am not going to have  
11      that evidence, apart from your assertion that that would be  
12      said if he could say it.

13              MR. TUMPOSKY: Understood, your Honor, and what I'm  
14      suggesting --

15              THE COURT: He is not proposing to offer testimony on  
16      this, is he?

17              MR. TUMPOSKY: No, he's not. But what I'm suggesting  
18      is that that came in at trial, it was a passing reference, had  
19      a very specific purpose, and I don't think it rises to the  
20      level of a sentencing consideration, quite frankly, your Honor.

21              THE COURT: I will have to tell you that it probably  
22      does, probably will affect me here, or at least I am assuming  
23      that I find it, and I just tell you tentatively that it was  
24      convincing to me at the time. The argument is made that he is  
25      the subordinate here, and to some degree that has to do with



1 skills and forcefulness I think, but I am not sure that he is  
2 differently situated for purposes of the conspiracy, somewhat  
3 different role.

4 MR. TUMPOSKY: From a legal perspective of course it  
5 doesn't matter, right?

6 THE COURT: Right.

7 MR. TUMPOSKY: And I'm not even suggesting that it  
8 would be appropriate for there to be a guideline reduction.  
9 But as far as consideration of relative culpability and how  
10 that affects the likelihood of re-offense, I think certainly  
11 the Court can examine what his role was in the entire  
12 operation, including the legal parts of it and the not-so-legal  
13 parts of it, and his role was almost inconsequential in the  
14 running of the operation.

15 THE COURT: I certainly would not take that position  
16 about it. Subordinate, less significant perhaps, but not  
17 inconsequential.

18 MR. TUMPOSKY: And I don't mean in the offense. I  
19 mean in the operation of the business.

20 THE COURT: Right. So do I.

21 MR. TUMPOSKY: He never got a single dollar. He  
22 didn't even have a title. In fact, I think the evidence was he  
23 showed up twice in the year that they were open.

24 THE COURT: Right, but for critically important  
25 occasions.

1 MR. TUMPOSKY: Well, Victor Torosyan testified that  
2 one occasion I think was to threaten him.

3 THE COURT: Right.

4 MR. TUMPOSKY: So, I'm not saying that he didn't have  
5 a role in the criminal offense. Obviously, the verdict spoke  
6 to that, and I am not contesting it. What I am saying is the  
7 Government has gone on about all of the sort of goings on in  
8 the relationships between various people, particularly David  
9 and others, as somehow suggesting that that warrants a sentence  
10 at the high end, and, quite frankly, none of those things, to  
11 whatever extent they are true, could be applied to Jambulat.  
12 His role in the offense is he has no criminal record and his  
13 exemplary behavior while on release. There is no evidence that  
14 this is anything but a one-off, an aberrant, quite frankly,  
15 behavior for him.

16 And so I think the Court should take those factors  
17 into account, and I think the sentence I request is a  
18 appropriate.

19 THE COURT: All right. Well, you understand the  
20 things that are on my mind. All three of you will have an  
21 opportunity to address them when we get to sentencing.

22 What I propose to do is have sentencing renewed and  
23 take up the rest of the questions that have to do with the  
24 acquittal and forfeiture on November 9th at 2:30.

25 MS. KAPLAN: That's fine with the Government.

1 MR. TUMPOSKY: Yes, your Honor.

2 MR. CRUZ: Yes, your Honor.

3 THE COURT: All right. Is there anything else that we  
4 can at least clear up at this point? I don't think there is.

5 All right. So, we will take up the remaining  
6 questions of judgment of acquittal and the forfeiture issue,  
7 which I will treat as related to the larger question of  
8 restitution here of the additional \$11,000.

9 We will be in recess.

10 THE CLERK: All rise.

11 (The Honorable Court exited the courtroom at 3:45 p.m.)

12 (WHEREUPON, the proceedings adjourned at 3:45 p.m.)  
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C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of *United State of America v. Tkhilaishvili, et al.*, No. 1:16-cr-10134-DPW.

Date: 04/30/18

/s/ Brenda K. Hancock  
Brenda K. Hancock, RMR, CRR  
Official Court Reporter